



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC PETITION NO EOO3 OF 2021

IN THE MATTER OF ARTICLES 19,20, 21, 22,23, 25, 27, 29

AND 39 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONSTRUCTION OF THE FUNDAMENTAL RIGHTS

AND FREEDOMS OF ARTICLES 40, 47, 48, 60, 61, 63, 64, 66, 67 AND 68 OF THE

CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF LAND ADJUDICATION ACT CHAPTER 284 LAWS OF KENYA

AND

IN THE MATTER OF NATIONAL LAND COMMISSION ACT, NO 5 OF 2012

AND

IN THE MATTER OF RULE 10 AND 11 OF THE CONSTITUTION

OF KENYA (PROTECTION AND FUNDAMENTAL RIGHTS AND

FREEDOMS OF THE INDIVIDUAL PRACTICE AND PROCEDURE

RULES, 2006 READ TOGETHER WITH RULE 19 OF THE SIXTH

SCHEDULE OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

WANDIEMA MUTYO KESIS AND 153 OTHERS.....PETITIONERS

VERSUS

THE COUNTY COMMISSIONER BUNGOMA.....1ST RESPONDENT

THE PRINCIPAL SECRETARY MINISTRY OF INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

THE KABD REGISTRAR BUNGOMA COUNTY.....3RD RESPONDENT

THE SURVEYOR BUNGOMA COUNTY.....4TH RESPONDENT
THE NATIONAL LAND COMMISSION.....5TH RESPONDENT
THE PRINCIPAL SECRETARY
MINISTRY OF LANDS AND PHYSICAL PLANNING.....6TH RESPONDENT
THE KENYA FOREST SERVICE.....7TH RESPONDENT

RULING

What calls for my determination by this ruling is the Petitioners' Notice of Motion dated 11th May 2021 and filed under Certificate of Urgency: -

The Petitioners seek the following orders: -

(a) Spent

(b) Spent

(c) That an interim order do issue restraining the Respondents by themselves, their agents, workers, servants and whomsoever claiming under them from evicting, harassing, threatening, destroying crops, livestock and torching homes and/or from interfering in any manner whatsoever with the Petitioners and other Chebombai Community members from the land parcels NO NORTH MALAKISI/NORTH WAMONO/595, 565, 566 AND 451 and all the parcels outside the cutline between Cheptais Forest and Chebombai area pending the hearing and determination of the Petition.

(d) Costs.

The application is supported by the affidavit of **TITUS WANDIEMA MUTIO** the 5th Petitioner herein and who has the authority of the other Petitioners herein. It is also based on the grounds set out therein.

The gist of the application is that the Petitioners as well as other Chebombai Community members reside and occupy parcels of land outside the cutline that separate Cheptais Forest and Chebombai area where they have lived since time immemorial having inherited those parcels from their ancestors. That cutline was established in the year 2001 by the 3rd, 4th, 6th 7th and 8th Respondents where a boundary was demarcated between Cheptais Forest and Chebombai area. The Petitioners have done great developments on the parcels of land outside the cutline where they grow both food and cash crops and also keep livestock. Partial registration and adjudication has already taken place in Chebombai area and some of the members of the Chebombai Community have been issued with title deeds being **NORTH MALAKISI/NORTH WAMONO/595, 565, 566 and 451**. Copies of which are annexures 1(a) (b) and (c). That some areas outside the cutline where the Petitioners occupy are yet to be surveyed for purposes of registration and transfer because the exercise was halted due to insecurity in the area.

However, since March 2021 to – date, the Respondents have been and are still issuing threats to evict the Petitioners from the parcels of land which they occupy and live on outside the cutline and have also threatened to destroy and torch the Petitioners' homes, crops and livestock terming them illegal squatters. Despite the Petitioners' pleas to the Respondents that they live and occupy portion of land outside the cutline and that even some of them have title deeds to the said portions of land, the Respondents have insisted that the Petitioners must vacate. The Petitioners have no other homes except the land parcels which they occupy outside the cutline and they therefore stand to suffer irreparable damage hence this application.

The application is opposed by the 1st, 2nd, 3rd, 4th, 6th and 7th Respondents who filed grounds of opposition dated 14th June 2021 and a replying affidavit dated 15th June 2021 by **HARRISON OUMA** the **REGIONAL COMMANDANT KENYA FOREST SERVICE – WESTERN CONSERVANCY**.

The 5th Respondent did not file any response to the application.

In the grounds of opposition filed by **MR GILBERT TARUS** a **SENIOR STATE COUNSEL** in the **ATTORNEY GENERAL's** office, it is stated that the application is frivolous, an abuse of the Court process, made in bad faith and against public interest. That it is tainted with falsehoods, misrepresentation and is an attempt to hoodwink the Court to win its sympathy unfairly and unjustly. That it is an attempt by the Petitioners to illegally occupy Gazetted Government Forest (Cheptais Forest) and does not satisfy the conditions set out in the case of **GIELLA .V. CASSMAN BROWN & CO LTD 1973 E.A 358**.

In his replying affidavit **HARRISON OUMA** has deponed, inter alia, that Cheptais Forest is a Gazetted Public Forest within the larger Mt Elgon Forest which has for a long time experienced serious degradation arising out of illegal encroachment and cultivation which prompted a multi – agency operation from 19th June 2020 to 22nd June 2020 to clear the forest. That the Kenya Forest Service is not aware of any threat of eviction allegedly issued in March 2021 and neither has it interfered with the land parcel **NO NORTH MALAKISI/NORTH WAMONO/595, 565, 566 and 451** which do not form part of Cheptais Forest. That the said Cheptais Forest was Gazetted in 1932 and there has been no de – Gazettment so far and there is no land that is outside the Forest cutline since the forest ends where there is private property.

That any eviction from Gazetted Forests usually follows elaborate process which involves the issuance of notices and public barazas. That the Petitioners have not demonstrated that they own any land within Cheptais Forest or the alleged forest cutline to warrant the orders sought. That another matter involving evictions at Chebombai Forest is still pending at this Court being **BUNGOMA ELC PETITION No 3 of 2020 RICHARD SIBILIBILI & OTHERS .V. KENYA FOREST SERVICES & OTHERS**. That this application should therefore be dismissed with costs as it is an abuse of the Court process frivolous and made in bad faith.

When the application was placed before me on 24th May 2021, I directed that it be canvassed by way of written submissions with the Petitioners filing and serving theirs within 7 days and the Respondents would thereafter have 14 days from the date of service within which to respond. The Petitioners were allowed a further 3 days from the date of service to file any supplementary affidavit. Thereafter the matter would be mentioned on 18th June 2021 to confirm compliance and a ruling dated was set for 30th June 2021 by way of electronic mail. I must however express my disappointment that notwithstanding the clear time lines set, **MR BW'ONCHIRI** Counsel for the Petitioners still submitted further pleadings as recently as 21st June 2021 which I directed the Registry to reject. I must once again implore Counsel and parties to abide by the directions given by the Court if the Constitutional imperative of serving justice without delay is to be adhered to.

I have considered the application, the rival affidavits and grounds of opposition as well as the submissions filed both by **MR BW'ONCHIRI** instructed by the firm of **OMUNDI BW'ONCHIRI ADVOCATES** for the Petitioners and by **MR GILBERT TARUS SENIOR STATE COUNSEL** representing the 1st, 2nd, 3rd, 4th, 6th and 7th Respondents.

This being an application for temporary injunction, it has to be considered in line with the principles set out in the case of **GIELLA .V. CASSMAN BROWN & CO LTD** (supra). These are: -

1. **The Applicant must establish a prima facie case with a probability of success.**
2. **An interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which cannot adequately be compensated by an award of damages.**
3. **If in doubt, the Court will determine the application on the balance of convenience.**

A prima facie case was defined in the case of **MRAO .V. FIRST AMERICAN BANK OF KENYA LTD & OTHERS C.A CIVIL APPEAL No 39 of 2002** as:-

“ A case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The above definition was approved by the Court of Appeal in the case of **NGURUMAN LTD .V. JAN BONDE NIELSEN & OTHERS C.A CIVIL APPEAL No 77 of 2012 [2014 eKLR]** where the Court said: -

“We adopt that definition save to add the following condition by way of explaining it. The party on whom the burden of proving prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

Finally, as was held in **FILMS ROVER INTERNATIONAL .V. CANNON FILM SAL LTD 1986 3 ALL. E. R.**, a Court considering such an application should take the route or course that appears to carry the lower risk of injustice should it turn out to have been **“wrong.”**

Together with the application now under consideration, the Petitioners had by their Petition dated 8th May 2021 sought various remedies against the Respondents and alleged a violation of their Constitutional rights including the right to acquire and own land and the right to life.

In paragraph 2, 3 and 7 of his supporting affidavit, **TITUS WANDIEMA MUTIO** the 5th Petitioner herein has deposed as follows: -

2: *“That the Petitioners and myself plus other Chebombai Community members reside and occupy parcels of land outside the cutline that separate Cheptais Forest and Chebombai area where we have lived since time immemorial having inherited the parcels from our ancestors”*

3: *“That we have done great developments on the parcels outside the cutline where we grow both food and cash crops plus rearing of livestock.”*

7: *“That since March 2021 and todate, the Respondents having been and are still issuing threats to evict us from the parcels of land that we occupy and live outside the cutline. The Respondents have too threatened to destroy and torch down our food and cash crops plus our livestock and homes terming us illegal squatters”* Emphasis added.

The Court would therefore have expected that in support of the averments that the Petitioners have lived outside the cutline areas **“since time immemorial”** where they **“have done great developments”** and that the Respondents have threatened to torch down their food, cash crops plus their **“livestock and homes,”** surely at least photograph of those livestock, homes and other developments should have been annexed to the application. In the absence of such evidence, there is some doubt on whether the Petitioners have a prima facie case or have demonstrated that they will suffer irreparable injury which cannot be adequately compensated by an award of damages.

This Court is however mandated, where in doubt, to determine the application on a balance of convenience. In so doing, I take into account that there is already an ex – parte order of temporary injunction which has been in place since 24th May 2021. There is also evidence in the form of Certificates of Search, although disputed in paragraph 5 of the replying affidavit by **MR HARRISON OUMA**, that infact some of the Petitioners and other members of the Chebombai Community have been issued with title deeds for parcels **NO NORTH MALAKISI/NORTH WAMONO 595, 565, 566 and 451** following the demarcation of the boundary between Cheptais Forest and Chebombai area. Of course whether or not those titles are within or outside Cheptais Forest will be a matter for trial to be proved by the available evidence. For now, however, this Court will be guided by what the Court said in **NGURUMAN LTD .V. JAN BONDE NIELSEN** (supra) that: -

“The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges.”

Therefore, if it should turn out that infact some of the Petitioners have title deeds following the adjudication process, then that is **“a fair and bona fide question”** that requires to be determined at the trial and which must, at this stage, persuade the Court in granting the temporary injunction sought rather than disallowing it.

Finally, I must also take cognizance of the caution in **FILMS ROVER INTERNATIONAL .V. CANNON FILM SAL LTD** (supra) that I should take the course which appears to carry the lower risk of injustice should it turn out that I am **“wrong.”** Taking all that into account I am persuaded that this is a proper application to allow.

Ultimately therefore, the Petitioners’ Notice of Motion dated 11th May 2021 is hereby allowed in the following terms: -

1. A temporary order of injunction is issued restraining the Respondents by themselves, their agents, workers, servants and whomsoever claiming under them from evicting, harassing, threatening, destroying crops, livestock and torching homes and/or from interfering in any manner whatsoever with the Petitioners and other Chebombai Community members from the land parcels NORTH MALAKISI/ NORTH WAMONO/595, 565, 566 and 451 and all parcels outside the cutline between Cheptais Forest and Chebombai area pending the hearing and determination of this Petition.

2. The Petitioners shall ensure that this Petition is heard and determined within the next 12 months otherwise this injunction shall lapse unless the Court orders otherwise.

3. Costs shall be in the Petition.

Boaz N. Olao.

J U D G E

30th June 2021.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF JUNE 2021 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.

Boaz N. Olao.

J U D G E

30th June 2021.